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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-866

EVELYN DEAN,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Mississippi

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INTRODUCTORY STATEMENT

The Petitioner, Evelyn Dean, respectfully petitions for a Writ of Certiorari to review the judgment of the Supreme Court of Mississippi unofficially reported as *Dean v. State*, 300 So.2d 797 (Miss. 1974), decided September 16, 1974, rehearing denied October 14, 1974, affirming the murder conviction and life sentence made and entered by the Circuit Court of DeSoto County, Mississippi, on February 23, 1973.

The opinion of the Supreme Court of Mississippi is bound with this Petition and marked Appendix A.

Petitioner was permitted to remain at large on bond for a period of ninety days from October 14, 1974, to allow filing of this Petition.

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed is the judgment of the Supreme Court of Mississippi affirming the murder conviction and life sentence of the trial court, dated October 14, 1974.

Petitioner believes that this Court has jurisdiction to review said judgment by Writ of Certiorari by virtue of 28 United States Code, Section 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

(1) Whether Petitioner's Fourteenth Amendment rights under the United States Constitution were abrogated by the admission into evidence of alleged self-incriminatory statements made by Petitioner without full warnings as to her constitutional rights.

(2) Whether Petitioner's Fourteenth and Sixth Amendment rights under the United States Constitution were abrogated by the trial court's refusal to instruct the jury on Petitioner's theory of self defense.

(3) Whether Petitioner was accorded due process of law where the conviction rests on parol evidence of one witness which did not establish cause of death and the jury is not instructed as to what it must find before returning a verdict of guilty.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, the Sixth Amendment to the Constitution of the United States, and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining Witnesses in his favor; and to have the Assistance of Counsel for his defence."

Section 1 of the Fourteenth Amendment provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioners was indicted by the Grand Jury of DeSoto County, Mississippi, for the murder of one Bobby Gene Hugnes. On trial, Petitioner was convicted of murder and sentenced to life imprisonment. This conviction and sentence was appealed to and affirmed by the Supreme Court of Mississippi and she now petitions this Court to review the affirming action of the Supreme Court of Mississippi.

On May 7, 1972, at approximately 12:30 p.m., DeSoto County Sheriff Lee Meredith arrived at the residence of the Petitioner and Bobby Gene Hughes. His presence at Petitioner's residence was occasioned by a telephone call from Petitioner's brother to the sheriff's office, wherein Petitioner's brother stated "that his sister (Petitioner) had shot a man at Redwood Estates." Upon arrival at the residence, Sheriff Meredith started toward the door to the mobile home and, according to the Sheriff's testimony, Petitioner opened the door. Sheriff Meredith then asked Petitioner, "What has happened?" to which Petitioner replied, "I shot him."

After this verbal exchange of question and response, Sheriff Meredith entered the trailer and inquired as to the location of the person who had been shot. Petitioner directed the Sheriff to the deceased. After ascertaining that Bobby Gene Hughes was in fact dead, the Petitioner, at the Sheriff's request, walked to an adjoining room, obtained the gun and handed same to the

Sheriff. According to the Sheriff's testimony, it was at this point that he advised Petitioner of her constitutional rights. Petitioner testified on trial that the Sheriff never advised her of her constitutional rights. This testimony was corroborated by two defense witnesses. According to Mr. Robert Brown and attorney Robert Whitwell, Sheriff Meredith stated, "No, I did not advise her of her rights, because she did not say anything."

Following an on-the-scene investigation, Petitioner was incarcerated at the DeSoto County, Mississippi, jail at approximately 3:00 o'clock p.m. on the afternoon of the shooting incident. Petitioner was seen by Dr. Wadsworth, Sr., and was given "medication", ostensibly to quiet her down. At 5:00 o'clock p.m. of the same day, Petitioner, according to Sheriff Meredith's testimony, stated that she was afraid of Bobby Gene Hughes and that she didn't know whether the gun would shoot or not, and she had taken it out to be sure that it would shoot.

On trial, Sheriff Meredith testified, over Defendant's objection, about Petitioner's statements about shooting Hughes and practice firing the gun before the shooting incident. Sheriff Meredith further testified that in his opinion Hughes was lying on the couch at the time he was shot. There was no ballistics tests, autopsy, paraffin tests or fingerprint tests made and no evidence to establish the crime of murder other than these two alleged statements made by the Petitioner and the Sheriff's singular opinion.

In opposition to the State's case, Petitioner testified that the shooting was in self-defense as Hughes, after brutally beating Petitioner and threatening to kill her, was reaching for a heavy vase on a credenza behind the sofa. The only witness to the incident was Petitioner.

Defense counsel timely made a motion to suppress as evidence all statements of Petitioner to Sheriff Meredith on the grounds that Petitioner was not fully advised of her constitu-

tional rights by law enforcement officials and that she was not represented by counsel when questioned. A hearing was had on this motion prior to trial and the same was overruled by the trial court.

At the conclusion of the testimony the record is undisputed that:

1. The State of Mississippi did not prove that Bobby Gene Hughes died as a result of gunshot wounds;

2. That the jury was not instructed as to what they must find to be fact before they could return a verdict of guilty;

3. Petitioner at no time intentionally, willingly or knowingly relinquished, abandoned or waived any constitutional rights prior to giving any statement to Sheriff Meredith;

4. No evidence was admitted which refuted Petitioner's account of the shooting incident;

5. Petitioner had been given medication while in custody and gave Sheriff Meredith statements and information which were admitted into evidence against her;

6. The State's case rests on one witness, Sheriff Meredith, and his opinion.

Defense motions for a directed verdict of not guilty were overruled and the case was submitted to the jury. After a verdict of guilty and sentence of life imprisonment, Petitioner again moved the Court for a new trial on the grounds, *inter alia*, that:

1. The verdict of the jury was against the overwhelming weight of the evidence; and

2. The Court erred in overruling the objection by Defendant to the testimony of Sheriff Meredith about statements al-

legedly made by Defendant to Sheriff Meredith at the DeSoto County Jail within approximately two hours after Defendant had received sedation from a doctor.

This motion was overruled. The constitutional issues presented by this Petition have been presented throughout the proceedings against Petitioner.

REASONS FOR GRANTING THE WRIT

The rulings of the trial court and the Supreme Court of Mississippi are in direct conflict with this Court's ruling in *Miranda v. Arizona*, 86 S.Ct. 1602, 384 U.S. 486, 16 L.Ed.2d 694 (1966), in that the rulings would allow a law enforcement officer, after ascertaining by independent means the accused's name and whereabouts, to not give an accused warnings of constitutional rights, deny there was any "interrogation" and use statements and information gleaned against an accused in order to obtain a conviction.

The conviction of Petitioner in no way complies with the due process of law inherent in our system of jurisprudence or the due process of law as heretofore defined and applied in the State of Mississippi.

ARGUMENT

Petitioner, by and through counsel, timely and properly protected the record below in making necessary motions to suppress, objections to testimony and motion for new trial. All motions and objections had as their object the suppression as evidence of any and all statements of Petitioner to Sheriff Meredith from the on-the-scene statement of "I shot him" through her in-custody statement about practice firing the alleged mur-

der weapon prior to the day of the shooting incident. The trial court's actions in overruling these motions and objections was sustained by the Supreme Court of Mississippi. The statement, "I shot him," was ruled admissible in evidence as a free and voluntary statement made while Petitioner was not in custody and not under interrogation. The in-custody statements as to test firing the gun were ruled admissible as statements made freely and voluntarily after Petitioner had twice received the warnings required by *Miranda*, supra, despite the fact that Petitioner had been sedated two hours earlier while incarcerated.

Petitioner urges that the record does not support these rulings. To hold thus, the trial court and the Supreme Court of Mississippi absolutely rejected evidence that Sheriff Meredith admitted that no constitutional warnings were given Petitioner at any stage of the investigation, interrogation, arrest and incarceration. It may reasonably be assumed that if the warnings had been given Petitioner would not remember them or realize the significance of the warnings because of her distraught emotional state and medication administered by Dr. Wadsworth. However, there is no need to make any assumptions or presumptions as to the testimony of Petitioner's son and her attorney when they, without dispute, testified that Sheriff Meredith advised them that he had at no time advised Petitioner of her rights, that it wasn't necessary because she had made no statements.

Petitioner submits that once Sheriff Meredith was advised, by Petitioner's brother, that Petitioner had shot a man at Redwood Estates, the investigation of the shooting incident, be it criminal or not, focused on Petitioner as the accused. Further, we submit that Sheriff Meredith was under the absolute duty to inform Petitioner of her constitutional rights prior to any questioning, including the question as to "what happened". The Sheriff was aware that a shooting had taken place and that Petitioner had done the shooting before arriving at the scene. With his arrival

at the scene, a murder investigation, unbeknown to Petitioner, was already in progress.

Petitioner respectfully urges this Court to review the action of the trial and Appellate Courts for the reason that Petitioner's conviction and sentence rest squarely on statements made by Petitioner when she had not been informed of her rights under the Constitution of the United States, *Miranda v. State of Arizona*, supra, Rehearing Denied, 87 S.Ct. 11, 385 U.S. 890, 17 L.Ed.2d 121, and had not waived her constitutional rights. There is no showing of an intentional relinquishment or abandonment of a known right or privilege, *Johnson v. Zerbst*, 58 S.Ct. 1019, 304 U.S. 458, 82 L.Ed. 1461 (1938) nor is there any evidence that Petitioner's statements were given by her when she could voluntarily, knowingly and intelligently either waive or invoke her constitutional rights and because of the testimony as to medication, the contrary would be true. Certainly, it is well settled in *Miranda*, supra, and the cases adhering to *Miranda*, supra, that the burden is on the State of Mississippi, not Petitioner, to prove the warnings and then a knowing, intelligent waiver and that such waiver cannot be assumed on the basis of a record which is silent as to a waiver of constitutional rights.

The record here establishes without question that Petitioner's defense was that of self-defense. The only eyewitness to the shooting incident was Petitioner. The record reflects the following testimony by Petitioner:

"I said, 'Bob, let's get married. Let's don't wait. Your son is in jail; my son is in jail. Let's get married right now. We can do it tomorrow.' He said, 'I'm not going to marry you. I like things just like they are, and this is the way they are going to stay.' And I said, 'Bob, please, let's get married now and make a life for ourselves and our children.' And he said, 'God damn you, I said no, we are not getting married.' And he grabbed me by the shoulders and threw me into the table, and I fell around a chair onto the floor. He said, 'I had just as soon shoot your

God damned brains out right now.' I was lying there in the floor, and I didn't know what he was going to do. (The defendant was very emotional and crying uncontrollably at this point in her testimony.) With that, he just walked to the living room sofa and sat down. I got up off the floor. The bar door was open; and the gun was laying there; and I picked up the gun in my right hand. I picked up my purse and my keys, which he had thrown in the floor. He had taken the keys to our house off of them and the keys to his car. I started toward the bedroom to pack, and he said, 'Where in the God damned hell are you going', as I went through the living area, and he said, 'Come over here.' And I said, 'Well, maybe he wants to talk, and maybe we can work this out.' I wanted to. I didn't want to leave him. So, I walked over and sat down on the coffee table and tried to reason with him. I said, 'We have a good thing going. We have already bought our home. Let's don't throw it away.' As I began to try to talk to him and say, 'Let's don't do this', he said that he liked things like they were and he wasn't going go get married. I don't know, sir, whether he was on pills that morning or not, because I had been to the jail. I don't know how many drinks he had had, because I hadn't seen the man before I left home. All I know is, when I got home the mood he was in and how he treated me. I had never been this abused by him before.

"He was sitting on the couch, and he said, 'Come on over here, I want to talk to you.' I just sat down in front of him with the gun in this hand, and the car keys and my purse were in this hand, and I said, 'Bob, please, let's don't do this. It's too good for both of us. Let's don't. Let's make a life for our children and for ourselves. We love each other.' And when I said that, he said, 'You're not going anywhere.' And he reached backward to get something, and he said, 'I'll beat the God damned hell out of you if you even start out of here.' And he reached back like this, and when he did, I don't remember it, but the gun went off. I dropped the gun, and I was standing in the floor screaming."

As the close of testimony, Petitioner requested the following instruction in keeping with the defense theory of self-defense:

"If the Defendant believed that her life had been threatened or that she was threatened with great bodily harm, she had a lawful right to approach the deceased on any peaceable mission or purpose and to use a deadly weapon in defense of her life, or herself from great bodily harm from an attack made upon her by the deceased."

This instruction was "refused" by the trial court and the refusal was upheld by the Supreme Court of Mississippi. Petitioner submits that the refusal of this instruction, previously authorized and sanctioned in Mississippi in *Wood v. State*, 165 Miss. 363, 144 So. 545 (1932) was error and in violation of the Petitioner's right to trial by jury on the theory of self-defense. The action of the courts below is a directed verdict of guilty because such refusal denied Petitioner the right to present adequately her theory of defense. Other instructions do not cure this error because not one of the instructions told the jury that Petitioner may be justified in arming herself and approaching the deceased on a peaceable mission. In this refusal the trial court did not submit to the jury and the jury did not pass on the Petitioner's theory of self-defense. Such action has repeatedly been condemned. See *United States v. Blane*, 375 F.2d 249 (6th Cir. 1967); *United States v. McKenzie*, 301 F.2d 880 (6th Cir. 1962); and *United States v. Gollin*, 166 F.2d 123 (3rd Cir. 1948).

Unlike many cases before this Court on Petition for a Writ of Certiorari or Appeal, Petitioner's claim to denial of due process of law rests upon the trial and record as a whole. While Petitioner contends that each of the following constitutes a gross denial of due process of law, the record establishes clearly, unequivocally and patently the following denials of constitutional due process:

1. Petitioner stands convicted of murder and sentenced to life imprisonment on testimony and proof which do not establish that the deceased died as a result of gun shot wounds inflicted by Petitioner. Nowhere is it shown what instrumentality caused the death of Bobby Gene Hughes. Our system of due process requires the State in a murder prosecution to establish beyond a reasonable doubt not only that there was a death, but that the deceased met his death by criminal agency. See *Gilleylen v. State*, 255 So.2d 661 (Miss. 1971) and cases cited therein. For the State of Mississippi to convict Petitioner on evidence which does not establish cause of death it must rely on basic denial of due process.

2. Under the established criminal law and procedure of the State of Mississippi and the several states, before a person charged with a crime can be convicted, it is essential that every element of the crime must be established by either direct or circumstantial evidence. If one element of the crime essential to the conviction of the Defendant is established by circumstantial evidence, it is necessary that it be proven to the exclusion of every reasonable hypothesis other than that of guilt. See *Gilleylen v. State*, supra; *Love v. State*, 208 So.2d 755 (Miss. 1968); 23A *C.J.S. Criminal Law*, Section 1252, at page 624 (1961). The conviction of Petitioner cannot stand the test of due process because such conviction rests on an absolute disbelief and rejection of Petitioner's account of the shooting incident and an unqualified acceptance of the Sheriff's opinion, unsupported by ballistics tests, fingerprints, paraffin tests and autopsy, that the deceased was shot where he lay. Petitioner urges that her conviction and any other conviction which rests solely on opinion, conjecture, speculation and guess is neither sanctioned or authorized by an individual's right to constitutional due process of law.

3. The record also established that the jury which convicted Petitioner was never instructed as to what it must find as fact before it could return a verdict of guilty. No instruction for the

State as to the State's theory of murder can be found in the record. Without such instruction, the jury was left to wander aimlessly about guided by abstract principles of criminal law. Such procedure is without precedent and surely represents a denial of Petitioner's constitutional rights of the greatest magnitude.

CONCLUSION

Petitioner respectfully submits that a review of the record establishes that this Petition for Writ of Certiorari should be granted, and that the judgment of the Supreme Court of the State of Mississippi which affirmed the judgment and sentence of the Circuit Court of DeSoto County, Mississippi, should be set aside. In the event that direct review by Certiorari be denied, we plead that this Court will do so without prejudice to filing for Federal habeas corpus after exhausting State remedies.

Respectfully submitted

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In the Supreme Court of Mississippi

No. 47,987

Evelyn Dean v. State of Mississippi

Smith, Justice:

Evelyn Dean was convicted in the Circuit Court of DeSoto County of the murder of one Bobby Gene Hughes. From her conviction and sentence to life imprisonment she appeals.

It appears from the record that the appellant is a mature woman, with five previous marriages, who was living with Hughes at the time of the homicide. She and Hughes were not married and, according to the appellant's testimony, the fatal quarrel arose out of her insistence that he marry her.

The substance of appellant's version of the circumstances which culminated in the homicide was that, to say the least of it, her life with Hughes had been tempestuous. She said that Hughes had a high temper and often struck and abused her. On the afternoon of the homicide she had returned to their trailer home at about 12:30 or 12:45. She found Hughes on the couch or sofa and she again broached the subject of marriage. Hughes rudely and unequivocally rejected the idea. One word led to another and Hughes "slung" her against a table and she fell on the floor. He accompanied that action she says, by threatening to kill her, although he made no move to do so. She got up from the floor and went into a small bar where she picked up a .38 caliber Smith & Wesson revolver. She testified that she did this because she was afraid of Hughes. As she started toward the bedroom, carrying the pistol in her right hand, Hughes, with an oath, asked her where she was going. She said that she told him she was going to her parents.

She then went toward the sofa where Hughes was sitting "in a relaxed position" and sat down opposite him on a coffee table, still holding the pistol in her right hand. Hughes said, according to appellant, "You are not going anywhere" and reached back toward a credenza on which there was a brass ash tray and a vase. She said that she believed he was reaching for one or the other of these objects, she didn't know which, with which to hit her as she continued to sit on the table. As he reached, according to appellant, Hughes said, "I'll beat the God damned hell out of you if you even start out of here." Appellant testified, "I don't remember doing it, but the gun went off" then, and Hughes slumped toward her. She says she does not remember pulling the trigger. Afterward, appellant says, she pushed Hughes back onto the sofa and put his leg, which had been on the floor, back on the sofa.

Appellant called her brother and asked him to call the sheriff, which he did. Responding to the call, the sheriff of DeSoto County arrived at the trailer. There, he testified, appellant met him at the door. He asked what had happened and appellant said "I shot him." The sheriff found Hughes lying on his back on the sofa dead, with two gunshot wounds, one just below his left ear, the other just below that, in the left side of the neck. Blood had accumulated below the wounds as Hughes lay on his back on the sofa and the sheriff said there was no blood at any other place. Photographs of the scene, showing the position of the deceased and his wounds were introduced without objection. This evidence was offered as tending to establish that deceased had been shot twice, with the shots closely spaced in the left side of the head and neck, as he lay on his back on the sofa. Also, it had the effect of tending to refute appellant's claim that Hughes had been sitting in the middle of the sofa, and that when the gun had "gone off" both of them had been moving.

It is evident, therefore, from appellant's own testimony, that immediately prior to the fatal shooting she and the deceased

were engaged in a serious quarrel and that this continued to the time of the shooting. She testified that Hughes was continuing to threaten her life as she sat before him on the coffee table, holding the revolver in her right hand. There was evidence, which the jury could believe, that appellant had stated previously that she loved Hughes and that "If I can't have him nobody else would." Also, the sheriff testified that appellant had told him at the jail that she had taken the revolver out previously and had practiced fired it in order to be certain that it would shoot as she was afraid of Hughes.

Appellant assigns as reversible error five "points." However, only two are argued or briefed.

It is contended that the sheriff of DeSoto County, the officer who investigated the homicide and who arrested appellant, should not have been allowed to testify as to statements made to him by her.

A motion was filed on behalf of appellant asking the trial court to suppress "confessions and or admissions" made by her to "any law enforcement officer" of DeSoto County "at any time" prior to indictment "or at any other time prior thereto or thereafter without being fully advised of her constitutional rights." Assigned as grounds for this motion were (1) she had not been "fully advised of her constitutional rights" by any officer or law enforcement official and (2) she had not been "properly represented by counsel" and was "improperly questioned without being advised of her constitutional rights" and was without "voluntary" counsel or "any other counsel" until subsequent to her arrest.

A preliminary hearing on this motion was requested and granted.

At this hearing, appellant neither testified nor offered any proof whatever. The DeSoto County sheriff, who was the only

officer concerned in the investigation and arrest and to whom such statements as were made had been addressed by appellant, testified as a witness for the State. He said that he had been called to the trailer home of the deceased by her brother who informed him of the shooting. When he arrived there appellant came to the door and, when asked what had happened, said "I shot him." The sheriff asked whether the man was dead or not and was told by appellant that she did not know. He observed the victim lying dead upon the couch. He saw two bullet wounds, one immediately below the left ear, the other a little below that, in the left side of the neck. The sheriff asked for the gun which appellant handed to him. This proved to be a .38 caliber Smith & Wesson revolver. At this point the sheriff first gave the appellant the "Miranda" warnings. A short time later, when appellant began talking to the sheriff, he repeated the warnings previously given.

After appellant was placed in jail, the sheriff obtained a doctor for her who visted her in her cell. The sheriff testified that the doctor's visit took place about 3:00 in the afternoon and that some kind of medication was given appellant by the doctor, but that the sheriff did not know what it was or whether it had been given by mouth or by injection. At about 5:00 in the afternoon appellant sent for the sheriff and he went to her cell. There is nothing in the record to indicate that at this (or at any other) time appellant was not in full possession of her faculties. Appellant spontaneously told the sheriff, without any interrogation, that she had, on a former occasion, taken out the gun with which she had killed Hughes, and had fired it, to see "if it would shoot" because she was afraid of Hughes. She told the sheriff that if he would look in her car he would find the empty shells between the seats. However, no search was ever made.

Appellant did not testify or offer any proof on the motion to suppress. She did deny, when testifying as a witness in her own

behalf, that she received the Miranda warnings as testified by the sheriff. She never suggested that she had been under the influence of medication or drugs at the time she had talked to the sheriff at the jail, although interrogated on cross-examination about what she had told him there. She denied having made the statement attributed to her as to test firing the gun. It will have been seen that the motion to suppress made no allegation that appellant had been in a drugged condition from medication or otherwise that might have impaired her understanding or will at the time she had sent for the sheriff and told him of test firing the gun. Moreover, no specific objection was made upon such a ground to the sheriff's testimony that the statements had been voluntarily made to him at the jail.

The only other point argued as to the motion to suppress is that the "Miranda warnings" twice given by the sheriff at the time of his investigation (which must have been later than 12:45 when appellant said she had returned to the trailer), were ineffective insofar as statements made by appellant at 5:00 in the afternoon were concerned, and is without merit. Especially is this true in a case such as this where it is perfectly clear from the record that there was never any "interrogation" of the appellant.

The "medication" contention was formally raised as one of the grounds assigned in a motion for a new trial. Since the motion to suppress did not specify this as a ground, and as the suggestion only appears in questions addressed to the sheriff on cross-examination, this was the first time the proposition was formally presented. It was alleged in the motion for a new trial that:

> (4) The Court erred in overruling the objection by Defendant to the testimony of Sheriff Lee Meredith about statements allegedly made by Defendant to Sheriff Meredith at the DeSoto County Jail within approximately two

> hours after Defendant had received sedation from a Doctor.

No proof of any kind to support this charge was offered or produced upon the hearing of the motion for a new trial.

Allegations of fact in a motion for a new trial are at issue without further pleadings, just as they are in any other type of motion. As with the motion to suppress, neither the appellant nor her doctor was offered to support the motion and there was no tender by appellant of a waiver of privilege with respect to the doctor's testimony. There is nothing in the record to support the view that appellant's statements made to the sheriff after she had called him to the jail were made at a time when she was under the influence of some drug or medication which destroyed her free will or understanding. The only evidence touching statements made by appellant to the sheriff is from the sheriff himself. He testified unequivocally that the statements were freely and voluntarily made by appellant after she had twice received from him the warnings required by Miranda.

The position of appellant with reference to the "medication" rests entirely upon conjecture, with no showing that she had been affected by it, whatever it may have been.

It would be ironical indeed if the case should be reversed upon such an unwarranted surmise and on remand it should develop that the "medication" had been, in fact, a couple of aspirin tablets.

> [A] motion is at issue without further pleading and that the allegations thereof do not amount to any proof of the facts stated therein. It is the duty of the movant to support his motion by proof and in the absence of proof in support of the motion, the presumption in favor of the correctness of the action of the trial court will prevail. (Brown v. State, 252 So.2d 885, 887 (Miss. 1971).)

Under the circumstances, a prima facie case of voluntariness was made out by the sheriff's testimony and it then became incumbent upon appellant to go forward with countervailing proof, if there was any.

The trial court correctly (1) overruled the motion to suppress and (2) denied the motion for a new trial.

The only other question argued and briefed relates to the refusal of the trial court to grant one of the four requested instructions dealing with appellant's right of self-defense. The other three were granted and adequately informed the jury as to the applicable law. The refused instruction, the denial of which is complained of, is a virtual copy of a part of an instruction, the giving of which this Court held to be justified under the peculiar facts of *Wood v. State*, 165 Miss. 363, 144 So. 545 (1932). Of the *Wood* case, this Court later said that: "The decision in Wood should be limited to the particular circumstances of that case, where the instruction joined the right to carry the weapon with the right to approach deceased on a peaceful mission."

It should be noted that, in *Wood*, this Court stated that the evidence that Wood fired only in self-defense made that fact practically "demonstrable." The evidence narrated by the Court in its opinion in *Wood* showed, as a matter of fact, that it *had been demonstrated* that Wood did not fire until after he had been fired upon. In *Wood*, the prior quarrel between Wood and the deceased was separated from the occasion of the shooting by a very considerable lapse of time. In the present case, according to appellant's own testimony, the quarrel in which she and Hughes were engaged was in progress, and had not ended. She was, she says, being threatened by deceased. Appellant's own version is that following a violent physical attack, in the face of deadly threats and in the course of an unfinished quarrel, she went into the bar, armed herself with a pistol, which she held

in her right hand as she responded to Hughes rude order to "come here," and that she had shot him twice when she believed that he was reaching for some object with which to hit her.

The portion of the *Wood* instruction which comprises the whole instruction tendered by the appellant in this case, and which the trial court refused to grant, improperly assumed as established facts as to which there was an issue to be determined by the jury under the circumstances of this case.

The weapon used by the appellant to kill Hughes was a revolver, a well-known type of firearm, which requires the exertion of definite force to pull the trigger, unless it has been "cocked" in advance, and there is no suggestion of this having been done. Appellant testified that she "didn't remember doing it but the gun went off," she does not know how. The evidence is that the deceased was shot twice, the wounds having been closely placed, one below the left ear and one in the left side of the neck. The sheriff's testimony as to the location of the pools of blood tends to show that the shots took effect as the deceased lay on his back on the sofa, and not, as appellant testified, as he sat in the center of the sofa in a "relaxed" position or as he was reaching behind him with one hand and reaching for her with the other. The resolution of these questions lay peculiarly within the province of the jury.

The evidence was sufficient to support the conviction and there having been no prejudicial error committed in the trial, the conviction and sentence appealed from must be affirmed.

Affirmed.

Rodgers, P. J., and Robertson, Walker and Broom, JJ., Concur.